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No. 97-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden,

Petitioner,

vs.

STEVIE LAMAR FIELDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

1. Are established state procedural default rules "inadequate" simply because courts in certain cases deviate from the rule in order to secure justice?

2. Should the federal courts adopt such a restrictive view of the adequacy of state procedural bars that states are encouraged to adopt severe, rigid, exceptionless rules?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The Ninth Circuit's structured treatment of the adequacy determination for the independent and adequate state grounds doctrine is in conflict with the purpose behind the doctrine 4

A. Supreme Court precedent 4

B. The Ninth Circuit 8

II

The Ninth Circuit's test for determining the adequacy of state procedural rules creates a conflict which requires this Court's resolution 13

A. Degree of flexibility acceptable 13

B. The cost of conflict 16

Conclusion 19

TABLE OF AUTHORITIES

Cases

Amos v. Scott, 61 F. 3d 333 (CA5 1995) 13, 14, 15

Andrews v. Deland, 943 F. 2d 1162 (CA10 1991) 15

Banks v. Horn, 126 F. 3d 206 (CA3 1997) 15

Barr v. City of Columbia, 378 U. S. 146, 12 L. Ed. 2d 766, 84 S. Ct. 1734 (1964) 7

Calderon v. U. S. District Court (Bean), 96 F. 3d 1126 (CA9 1996) 10

Calderon v. U. S. District Court (Hayes), 103 F. 3d 72 (CA9 1996) 10

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991) 4, 5

Davis v. Wechsler, 263 U. S. 22, 68 L. Ed. 143, 44 S. Ct. 13 (1923) 5, 7

Dugger v. Adams, 489 U. S. 401, 103 L. Ed. 2d 435, 109 S. Ct. 1211 (1989) 14

Duvall v. Purkett, 15 F. 3d 745 (CA8 1994) 15

Fields v. Calderon, 125 F. 3d 757 (CA9 1997) ..... Passim

Ford v. Georgia, 498 U. S. 411, 112 L. Ed. 2d 935, 111 S. Ct. 850 (1991) 5, 8, 10

Harris v. Reed, 489 U. S. 255, 103 L. Ed. 2d 308, 109 S. Ct. 1038 (1989) 18

In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P. 2d 729 (1993) 11, 16

In re Dixon, 41 Cal. 2d 756, 264 P. 2d 513 (1953) 3, 9

In re Fields, 51 Cal. 3d 1063, 275 Cal. Rptr. 2d 384,
800 P. 2d 862 (1990) 2

In re Harris, 5 Cal. 4th 813, 21 Cal. Rptr. 2d 373,
855 P. 2d 391 (1993) 3, 9, 14

In re Waltreus, 62 Cal. 2d 218, 43 Cal. Rptr. 9,
397 P. 2d 1001 (1965) 9

James v. Kentucky, 466 U. S. 341, 80 L. Ed. 2d 346,
104 S. Ct. 1830 (1984) 5

Johnson v. Mississippi, 486 U. S. 578, 100 L. Ed. 2d 575,
108 S. Ct. 1981 (1988) 5, 8

Kolender v. Lawson, 461 U. S. 352, 75 L. Ed. 2d 903,
103 S. Ct. 1855 (1983) 17

Lambrix v. Singletary, 520 U. S. ___, 137 L. Ed. 2d 771,
117 S. Ct. 1517 (1997) 4

Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606,
110 S. Ct. 3092 (1990) 18

Morales v. Calderon, 85 F. 3d 1387
(CA9 1996) 10, 11, 12, 17, 18

NAACP v. Alabama ex rel. Flowers, 377 U. S. 288,
12 L. Ed. 2d 325, 84 S. Ct. 1302 (1964) 5, 8

NAACP v. Alabama ex rel. Patterson, 357 U. S. 449,
2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958) 5, 7

Parke v. Raley, 506 U. S. 20, 121 L. Ed. 2d 391,
113 S. Ct. 517 (1992) 18

People v. Fields, 35 Cal. 3d 329, 197 Cal. Rptr. 2d 803,
673 P. 2d 680 (1983) 2, 3, 9

Prihoda v. McCaughtry, 910 F. 2d 1379
(CA7 1990) 15, 16, 17, 18

Reich v. Collins, 513 U. S. 106, 130 L. Ed. 2d 454,
115 S. Ct. 547 (1994) 6, 7

Richmond v. Lewis, 506 U. S. 40, 121 L. Ed. 2d 411,
113 S. Ct. 528 (1992) 17

Staub v. City of Baxley, 355 U. S. 313, 2 L. Ed. 2d 302,
78 S. Ct. 277 (1958) 7

Rule of Court

Supreme Court Rule 10 ..... 8, 13

State Statutes

Ga. Code. Ann. § 48-2-35(a) (Supp. 1997) 6

Tex. Code Crim. Proc. Ann., Art. 11.071, § 5
(Vernon's Supp. 1998) 16

Treatise

16 B C. Wright, A. Miller, & E. Cooper, Federal Practice and
Procedure (2d ed. 1996) 5, 7, 8

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

California's *Dixon* rule guarantees the efficient and timely resolution of an appellant's claims. The Ninth Circuit's refusal to respect this rule in the present case has needlessly delayed

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

enforcement of the state's death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Twenty years ago, Stevie Lamar Fields engaged in what the California Supreme Court described as a "one-man crime wave." *People* v. *Fields*, 35 Cal. 3d 329, 336, 673 P. 2d 680, 683 (1983). The spree, which occurred during the three weeks after his parole from prison,[2] resulted in convictions for

> "the following offenses: the robbery murder of Rosemary C., with the special circumstance of willful, deliberate, and premeditated murder during the commission of a robbery; the robbery of Clarence G.; the kidnaping for robbery and forced oral copulation of Cynthia S.; the kidnaping for robbery and robbery of Gwendolyn B., as well as rape, forcible oral copulation, and assault with a deadly weapon on Gwendolyn; the kidnaping, robbery, forcible oral copulation, and rape of Colleen C." *Ibid.*

A jury returned a verdict of death on July 12, 1979. See Pet. for Cert. 3. On direct appeal, the California Supreme Court affirmed Fields' sentence and conviction. *Fields*, *supra*, 35 Cal. 3d, at 374, 673 P. 2d, at 709, cert. denied, 469 U. S. 892 (1984). Fields filed a state habeas petition, amended it and eventually was denied relief in 1990. *In re Fields*, 51 Cal. 3d 1063, 800 P. 2d 862 (1990), cert. denied, 502 U. S. 845 (1991).

Fields then began proceedings in the federal courts. He was not there very long though. His first petition as amended was stayed while Fields exhausted all of his state claims. *Fields* v. *Calderon*, 125 F. 3d 757, 759 (CA9 1997). Upon return to the state court, Fields was again denied relief on procedural default

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2. Fields had been in prison serving a sentence for manslaughter before his release. *Ibid.*

grounds. The court cited *In re Harris*, 5 Cal. 4th 813, 829, 855 P. 2d 391, 398 (1993) and *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953) as authority to bar Fields' claims. See 125 F. 3d, at 759.

After his certiorari petition was denied by this Court, *Fields* v. *California*, 514 U. S. 1022 (1995), Fields returned to the District Court with a second amended petition. *Fields*, 125 F. 3d, at 759. The state moved to dismiss the petition due to the procedural default and a hearing was held. *Ibid.* The District Court, finding the *Dixon* rule an independent and adequate state ground to bar Fields' claims, dismissed all of Fields' defaulted claims. *Ibid.*

The Court of Appeals reversed. Because of "[t]he flexible application of the *Dixon*" rule and the "element of discretion" inherent in the rule, the Ninth Circuit concluded that the rule is not an adequate state ground to bar federal review of Fields defaulted claims." *Id.*, at 762, 764-765. The Ninth Circuit erroneously relied on the rule's allegedly "undefined exceptions" and their "inconsistent" application to defeat an adequate state ground.

SUMMARY OF ARGUMENT

The independent and adequate state grounds doctrine should secure the state's interest in enforcing its procedures while protecting the individual's federal rights. The Ninth Circuit's opinion, in the present case, undermines the state's interest and conflicts with the purpose behind the doctrine. The Ninth Circuit's misguided interpretation of this Court's disparate descriptions of adequacy permits departure from the basic rationale and requires this Court's guidance to develop a standard that will secure the doctrine's purpose.

The Ninth Circuit's rigid, unworkable standard for determining adequacy is in conflict with other circuits which allow for the "occasional act of grace." A degree of flexibility is needed to give real force to state procedural rules. Requiring

rigid standards, on the other hand, will only serve to induce the states "to make their rules draconian." Certiorari should be granted to resolve the conflict among the circuits and to establish a workable standard for the circuits.

ARGUMENT

I. The Ninth Circuit's structured treatment of the adequacy determination for the independent and adequate state grounds doctrine is in conflict with the purpose behind the doctrine.

A. Supreme Court Precedent.

Under the independent and adequate state grounds doctrine, a state court decision prevents review of a federal question when it "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). The doctrine bars consideration of federal claims raised by a petition for habeas corpus, as well as on direct appeal, regardless of the fact that on federal habeas review the doctrine is "not technically jurisdictional." [3] *Lambrix* v. *Singletary*, 520 U. S. ___, 137 L. Ed. 2d 771, 783, 117 S. Ct. 1517, 1522 (1997). The same standard is applied to both types of claims because if it was not applied to habeas corpus "a federal district court or court of appeals would be able to review claims that this Court would not have been able to consider on direct review." *Id.*, at 784, 117 S. Ct., at 1523. This would result in the state prisoner receiving "an end run around the limits of this Court's jurisdic-

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3. "[W]hen a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U. S. C. § 2254 . . . the federal court is not formally reviewing a judgment, but is determining whether the prisoner is 'in custody in violation of the Constitution or laws or treaties of the United States.' " *Lambrix* v. *Singletary*, 520 U. S. ___, 137 L. Ed. 2d 771, 783, 117 S. Ct. 1517, 1522 (1997).

tion and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U. S., at 731.

The two prongs of the independent and adequate state grounds doctrine should secure the state's interest in enforcing its procedures while protecting the individual's federal rights. 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, p. 386 (2d ed. 1996). Justice Holmes captured the essence of the independent and adequate state grounds rule long ago. "Whatever springes the state may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, *when plainly and reasonably made*, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (emphasis added); see also *James* v. *Kentucky*, 466 U. S. 341, 349 (1984) (quoting *Davis*). However, the Ninth Circuit's use of rigid guidelines to determine adequacy undermines the state's interest and needs to be corrected by this Court. Because the many descriptions of adequacy, see *post*, at 7-8, have skewed the rationale behind the doctrine and led to this erroneous result in the Ninth Circuit, a clear statement from this Court as to the appropriate approach is needed.

This Court's precedent demonstrates that the determination of adequacy primarily depends on the petitioner receiving fair notice of the state procedural rule's existence. The Court consistently holds inadequate rules that trap, mislead, or deceive the defendant into failing to assert his federal right at the time or in the manner which the state court later determines was the required time or the required manner. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new procedural rule); *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988) (state supreme court had expressly stated that collateral review, not sentencing and appeal, was proper forum for attacking priors); *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964) (rule going only to form, not substance, applied with "pointless severity," unlike prior applications); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457

(1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence").

A recent decision by this Court demonstrates its reliance on fair notice as the determining factor of the adequacy of state rules to bar federal claims. In *Reich* v. *Collins*, 513 U. S. 106, 110 (1994), this Court addressed "whether it was proper for the Georgia Supreme Court to deny Reich relief on the basis of Georgia's predeprivation remedies" for unlawful taxes. The Court recognized that the state, in accord with due process principles, could provide either predeprivation, postdeprivation or a hybrid remedial scheme so long as it was "clear and certain." *Id.*, at 110-111. However, the Court also explained that "[w]hat a State may *not* do, and what Georgia did [in *Reich*], is to reconfigure its scheme, unfairly, in *mid-course*—to 'bait and switch,' . . . ." *Id.*, at 111 (emphasis in original).

This Court was particularly concerned with the taxpayer's ability to determine and reasonably seek the remedy available from the Georgia statute. *Ibid.*; see also Ga. Code. Ann. § 48-2-35(a) (Supp. 1997). These concerns were demonstrated by the factors relied on by the Court to conclude that "Georgia held out what plainly appeared to be a 'clear and certain' postdeprivation remedy." *Reich*, 513 U. S., at 111. First, the Court recognized that the average taxpayer reading the statute's "sweeping language" would not think that Georgia's predeprivation remedies were "the *exclusive* remedy for unlawful taxes." *Ibid.* (emphasis in original). Second, the Court concluded that none of the Georgia Supreme Court cases applying the statute before Reich's first appearance before the Georgia Supreme Court "put any limiting construction on the statute's sweeping language." *Id.*, at 112. Finally, the Court found it particularly relevant that "States ordinarily *prefer* that taxpayers pursue only postdeprivation remedies." *Ibid.* (emphasis in original). Each factor is concerned with the taxpayer's ability to determine the appropriate procedure for seeking relief and ensuring that taxpayers will not be unfairly precluded from receiving relief.

While never explicit as to its application of the independent and adequate state grounds doctrine, the Court made, for present purposes, a compelling analogy. By explaining that *Reich* "bears a remarkable resemblance to *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958) (Harlan, J.)," this Court made a significant step towards the appropriate standard for the adequacy determination. 513 U. S., at 112. *Patterson* stands for "the proposition that novel procedural requirements cannot be interposed to bar consideration of federal claims" thereby ensuring that a petitioner has a fair opportunity to present his federal claims. See *Patterson*, *supra*, 357 U. S., at 457-458; 16B Wright, Miller & Cooper, *supra*, § 4027, at 387. The Court's analogy reaffirms what is implicit in its prior holdings: the adequacy of the relevant state rule is secured by giving fair notice of the rule's existence and applying the rule reasonably.[4]

To secure this basic rationale, the Court has described the test for adequacy in a variety of ways. For example, *Davis*, *supra*, 263 U. S., at 24-25 explained that "unreasonable obstacles" created by the state rule could not be used to prevent review of federal claims. While in *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958) the Court explained that an "arid ritual of meaningless form" would not bar federal review. *Patterson*, *supra*, 357 U. S., at 457 asserted that if the very existence of the rule at the time of the default is so unclear that "petitioner could not fairly be deemed to have been apprised of [the rule's] existence," then the rule cannot be the basis for default. There is also the test that originated in *Barr* v. *City of Columbia*, 378 U. S. 146, 149-150 (1964), which explained that unless a state procedural rule is "strictly or regularly followed," it will not be an adequate ground to bar federal review. See *Johnson*, *supra*,

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4. Interpretations of Supreme Court precedent have also explained "that state procedure may be followed so long as it affords a reasonable opportunity to assert federal rights." 16B Wright, Miller & Cooper, *supra*, § 4028, at 404.

486 U. S., at 587.[5] Finally, there is the test forming the basis for the Ninth Circuit's unforgiving application of adequacy: a state rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied" to be deemed adequate. *Ford*, *supra*, 498 U. S., at 424 (quoting *James*, *supra*, 466 U. S., at 348-349); *Fields* v. *Calderon*, 125 F. 3d 757, 760 (CA9 1997).

In each of these disparate descriptions, the basic rationale can be found. However, until this Court clarifies the appropriate course for the circuits, misguided applications of this language will lead to inconsistent results among the circuits and create further departures from this Court's precedent. The factors relied upon in the *Reich* opinion captured the essence of the rule Justice Holmes described so long ago. These factors, however, are in stark contrast to the factors relied upon in the Ninth Circuit to determine adequacy. The Ninth Circuit's holding in the present case offers this Court the opportunity to make explicit what the *Reich* opinion clearly implied.

B. The Ninth Circuit.

The Ninth Circuit does not adhere to the basic rationale behind the independent and adequate state grounds doctrine. It uses a narrow reading of the "firmly established and regularly followed" test to defeat an adequate state ground. Indeed, in the words of this Court in *Flowers*, *supra*, 377 U. S., at 297, it is the Ninth Circuit that has applied a rule with "pointless severity." This error can only be corrected by this Court and warrants the granting of certiorari. See Supreme Court Rule 10(c).

The Ninth Circuit concluded that "the *Dixon* rule [was] not an adequate state ground to bar federal review of Fields'

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5. Wright, Miller, and Cooper describe this test as adding a "new source of uncertainty . . . seeming to undercut the role of discretion in state procedure." 16B Wright, Miller & Cooper, *supra*, § 4028, at 394. Undercutting state discretion is the exact result the Ninth Circuit's unforgiving structure of adequacy is having even though it is based on this Court's "regularly followed" language. See *supra*, at 10.

defaulted claims." *Fields*, *supra*, 125 F. 3d, at 765. The *Dixon* rule was not a recent development; it had been in existence since 1953. *In re Dixon*, 41 Cal. 2d 756, 264 P. 2d 513 (1953). In fact, the rule had been around for nearly three decades when petitioner appealed his conviction. See *People* v. *Fields*, 35 Cal. 3d 329, 673 P. 2d 680 (1983). As recognized by the Ninth Circuit, the rule did have exceptions. *Fields*, 125 F. 3d, at 763. The California Supreme Court, over the years, had recognized exceptions to the *Dixon* rule for 1) "fundamental constitutional error," 2) "lack of fundamental jurisdiction," 3) "acting in excess of jurisdiction," and 4) "change in the law." See *In re Harris*, 5 Cal. 4th 813, 829-841, 855 P. 2d 391, 398-407 (1993) (discussion of the exceptions to the *Dixon* and *Waltreus* rules);[6] *Fields*, 125 F. 3d, at 763. The Ninth Circuit relied on *In re Harris*' "lengthy discussion" of the *Dixon* and *Waltreus* rules to support its position that the rule had been inconsistently applied. *Fields*, 125 F. 3d, at 763 (quoting *In re Harris*, 5 Cal.4th, at 829, 855 P.2d, at 398).

The Ninth Circuit asserted that the discussion of the exceptions in *Harris* "explicitly acknowledged that [the Supreme Court of California's] application of the *Waltreus* and *Dixon* rules had become obscured . . . ." *Ibid.* The Ninth Circuit also relied on *In re Clark*'s description of California's habeas procedural rules as being " '*subject to undefined exceptions*' " that provide " '*no clear guidelines*' " to indicate when departure from the rule is warranted. *Ibid.* (quoting *In re Clark*, 5 Cal. 4th 750, 763, 768, 855 P. 2d 729, 737, 740 (1993)) (emphasis added in *Fields*).

However, as the opinion demonstrates, the exceptions can be easily summarized and classified into four distinct categories. Still, these established exceptions to the *Dixon* rule and the rule's long existence were not enough for the Ninth Circuit

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6. Although the issue in *Harris* involved the rule derived from *In re Waltreus*, 62 Cal. 2d 218, 397 P. 2d 1001 (1965), the *Harris* Court explained that its discussion also applied to the *Dixon* rule. See *In re Harris*, 5 Cal. 4th, at 825, n. 3, 855 P. 2d, at 395, n. 3; see also *Fields* v. *Calderon*, 125 F. 3d, at 762.

to deem it adequate. *Id.*, at 765. Because *Dixon* and its exceptions "includes an element of discretion," the Ninth Circuit requires that the "standards governing the exercise of discretion are firmly established and are consistently applied . . . ." *Id.*, at 762. Limiting its review to nine cases that dealt with the *Dixon* rule between 1973 and 1981, the Ninth Circuit concluded that the rule and its exceptions had not been consistently applied during that period. *Id.*, at 764.[7]

Proving the allegedly inconsistent application of the rule and its exceptions is the main focus of the Ninth Circuit's opinion. See *id.*, at 763-764. Notification of the rule's existence and its probable application to the present facts was not enough to satisfy the Court of the rule's adequacy. The Ninth Circuit's overreliance on consistency as a determining factor may stem from the "regularly followed" language found in *Ford*, *supra*, 498 U. S., at 424. However, this overreliance misconstrues the essence of the doctrine, one of fair notice and fair play. Deviations from established rules should not be a basis for concluding that the petitioner did not have fair notice of the rule's probable application. Further, requiring that exceptions have clearly identifiable boundaries is overly stringent and unworkable.

Allowing exceptions to destroy a rule's force as a procedural bar is not new to the Ninth Circuit. The holding in the present case rests on a string of erroneously decided cases originating with *Morales* v. *Calderon*, 85 F. 3d 1387 (CA9 1996). See *Calderon* v. *U. S. District Court* (*Hayes*), 103 F. 3d 72, 74 (CA9 1996); *Calderon* v. *U. S. District Court* (*Bean*), 96 F. 3d 1126, 1130 (CA9 1996). In *Morales*, the Court denied preclusive effect to Morales' default, concluding "that California's rule on timeliness was not 'clear, *consistently* applied, and well-established.' " 85 F. 3d, at 1393 (emphasis added).

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7. See also Pet. for Cert. 13-18 (discussing the problems with the use of this small sample of cases).

The *Morales* court's conclusion was based on three premises. First, the *Morales* court asserted that the timeliness standards were "uncertain" because they did not define "substantial" delay or criteria for determining "good cause." *Id.*, at 1391. Second, the Court relied on the California Supreme Court's acknowledgment in *Clark*, *supra*, 5 Cal. 4th, at 763, 768, 855 P. 2d, at 740, that the rule lacked clear criteria for *departure* from it. And, finally, the *Morales* court justified its decision based on the fact "that at the time [Morales'] case was litigated in the district court, the California Supreme Court had *denied* 35 habeas petitions filed three years or more after affirmance on direct appeal, and more than half of those denials had not been on grounds of untimeliness." 85 F. 3d, at 1391.

The Ninth Circuit's analysis in both *Morales* and *Fields* forms a sharp contrast with this Court's analysis in *Reich*. In *Reich*, this Court did not question the state's ability to structure a rule with "sweeping language." As the first two factors relied on by this Court illustrate, the *Reich* Court's only concern was whether the language put the individual on notice of the possibility of forfeiture if the individual did not follow certain procedures. See *supra*, at 6. Since the "sweeping language" could include the postdeprivation remedy, the Court did not allow the state's "bait and switch." See *supra*, at 6. In *Morales*, however, the rule puts the petitioner on notice that "substantial delay" without "good cause" for the delay could result in defaulted claims. See *supra*, at 10-11. Similarly, in *Fields*, the petitioner could anticipate the *Dixon* rule's application to bar his claims unless he could prove a lack of jurisdiction, a change in the law, or a fundamental error. See *supra*, at 9. These rules may be flexible and make room for the "occasional act of grace." However, the rule's sweep does not diminish the petitioner's notice of its existence. Furthermore, these rules have not been changed in "mid-stream" to strip petitioner of his remedy. The state is simply playing by the rules it established.

Notice of the rule's existence does not play a true part in the Ninth Circuit's analysis. The second factor relied on by the

Morales and *Fields* courts demonstrates this point further. The *Morales* court defeats the timeliness rule based on the fact that the exceptions to the rule were not clearly defined. In *Fields*, the exceptions likewise defeated the *Dixon* rule. The exceptions do not change the fact that the rule may be applied to the petitioner's claims, that he had notice of this possible application, and that he could have prevented this possible application. The Ninth Circuit instead requires sharply defined standards that allow the court to look over the state's shoulder to see if it is applying its own rule correctly. If the rule is not sufficiently structured, it is deemed "inadequate." This Court has never required that state procedural rules be so stringently defined as the Ninth Circuit now requires. The mere fact that the Ninth Circuit has no way of knowing whether the California Supreme Court is exercising its discretion in a principled manner, see *Morales*, 85 F. 3d, at 1392, is enough to toss out the state rule.

This Court looks at the big picture.[8] The Ninth Circuit limits its analysis to the fine details and limited surveys of cases to defeat adequate state rules.[9] The Ninth Circuit's analysis clearly misconstrues the independent and adequate state grounds doctrine's purpose. The analysis is not concerned with whether the petitioner actually received fair notice of a procedural rule and is not trying to prevent an unfair "bait and switch" by the state. This departure from the true essence of the doctrine needs to be corrected.

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8. See *supra*, at 6 (discussing the third factor relied on by the *Reich* Court).

9. See *supra*, at 11 (discussing the *Morales* court's third justification for its decision); see also Pet for Cert. 13-18 (discussing the Ninth Circuit's limited review of *Dixon* cases).

II. The Ninth Circuit's test for determining the adequacy of state procedural rules creates a conflict which requires this Court's resolution.

A case is appropriate for review on certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . ." Supreme Court Rule 10(a). In developing guidelines to determine whether a state rule is "firmly established," "strictly or regularly followed," or creates an "unreasonable obstacle," the circuits have come to varied results. The various descriptions of adequacy, see *supra*, at 7-8, can support each of these determinations, thus allowing for this disparate treatment. The Ninth Circuit has departed from this Court's basic rationale, see *supra*, at 9-10, while other circuits have adhered to the true spirit of this Court's precedent in applying the adequacy bar. These conflicts can only be corrected by this Court and make this an appropriate case to review on certiorari.

A. Degree of Flexibility Acceptable.

The Fifth Circuit has explained that "an occasional act of grace" by a state court does not disqualify a state rule as an adequate ground to procedurally bar a habeas claim. *Amos* v. *Scott*, 61 F. 3d 333, 342 (CA5 1995). This test recognizes that the "element of discretion," so troubling to the Ninth Circuit, does not defeat the petitioner's notice of the rule's existence and does not render a rule inadequate in the Fifth Circuit.

The state rule at issue in *Amos* was Texas' contemporaneous objection rule. The rule had been in existence since 1972 and had been applied in a "myriad" of cases. *Id.*, at 340. To prevent injustice caused by the imposition of Texas' contemporaneous objection rule, Texas courts had developed "two recognized exceptions—the 'right not recognized' exception and the 'fundamental error' exception . . . ." *Id.*, at 343. The Texas courts had also deviated from the rule in the " 'interest of justice'. . . ." *Id.*, at 340. In spite of these deviations, the

federal district court relied on the rule "as an 'independent and adequate state-law ground'" to bar federal review of Amos' claim "that the totality of circumstances surrounding his trial violated his Sixth Amendment right to a fair trial." *Id.*, at 337.

Amos, however, claimed that the rule and its exceptions were neither "strictly nor regularly followed" in Texas. *Id.*, at 338. Amos relied on three arguments to support his claim that the rule was not adequate to bar federal review. First, he relied on the cases where the courts failed to comply with the rule " 'in the interest of justice.' " *Id.*, at 340. Second, he argued "that a failure to apply, consistently and rationally, recognized *exceptions* to a procedural default rule will render the larger procedural rule an inadequate state law ground in *all* cases." *Id.*, at 343 (second emphasis added). Finally, he claimed that because the rule is "inherently discretionary" it is *per se* inadequate. *Id.*, at 345. Neither the flexibility of the rule and its exceptions nor the deviations from the rule and its exceptions persuaded the *Amos* court that the rule had not been regularly followed. *Ibid.*

Citing *Dugger* v. *Adams*, 489 U. S. 401, 410, n. 6 (1989), the Fifth Circuit explained that the concept of adequacy had been defined as including "a state procedural ground that is strictly or regularly applied *evenhandedly to the vast majority of similar claims.*" *Amos*, 61 F. 3d, at 339 (emphasis in original). Amos' attempt to discredit the "rule in its entirety," *id.*, at 340, by relying on exceptions made for "dissimilar claims," failed because the Court was "unwilling to set such an arbitrarily Draconian trap for the unwary" state courts. *Id.*, at 341, n. 24.

In contrast, the Ninth Circuit has set such a trap. Like Texas' contemporaneous objection rule, the *Dixon* rule was not a new development in the law. See *supra*, at 9. Likewise, the California Supreme Court had recognized exceptions to the *Dixon* rule over the years. See *supra*, at 9. These exceptions were similar to the exceptions recognized in the *Amos* court. *In re Harris*, 5 Cal. 4th 813, 829, 855 P. 2d 391, 398 (1993)

("fundamental constitutional error" exception); cf. *Amos*, *supra*, 61 F. 3d, at 343 (" 'fundamental error' exception"). However, unlike the Fifth Circuit, the Ninth Circuit concluded that the rule was not an adequate state ground to bar federal review. *Fields* v. *Calderon*, 125 F. 3d 757, 763 (CA9 1997). The Ninth Circuit's concern over having absolute boundaries for state procedural rules and their exceptions allowed it to overlook the "overall regularity and consistency" of the rule's application in most cases. Cf. *Amos*, 61 F. 3d, at 345.

The Ninth Circuit's reliance on flexible exceptions applied to "dissimilar claims" to defeat a state procedural rule is in stark contrast to the *Amos* opinion. The *Amos* court allowed state procedural rules and their exceptions to have a certain degree of flexibility in order to secure justice. *Ibid.* The Ninth Circuit, on the other hand, demands the development of "clear guidelines" that are applied "consistently" to all claims, similar or not.

Like the Fifth Circuit, other circuits have also given state procedural rules this required degree of flexibility. In *Duvall* v. *Purkett*, 15 F. 3d 745, 747 (1994), the Eighth Circuit had no problem with a state rule creating an exception for "manifest injustice," noting that it was similar to rules applicable in federal courts. In *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1381 (CA7 1990), even though the state rule permitted exceptions for "sufficient reason," the inevitable uncertainty in application was not enough to defeat the rule's adequacy. *Id.*, at 1385.[10] The Tenth Circuit in *Andrews* v. *Deland*, 943 F. 2d 1162, 1190 (1991), and the Third Circuit in *Banks* v. *Horn*, 126 F. 3d 206, 211 (1997) have adopted *Amos*' standard holding that "an occasional act of grace" does not disqualify a state rule. None of these circuits have held that the state must establish "reasonable operating limits" for the dispensation of grace that the Ninth Circuit now requires as illustrated by the *Fields* and *Morales* line of cases.

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10. See part II B, *post*, at 16-18 (further discussion illustrating how the *Prihoda* decision conflicts with the Ninth Circuit).

B. The Cost of Conflict.

Throughout the country, states are in the process of reshaping their procedural default rules. The reshaping may be in the form of case law, as in California under *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993) or by legislation. See, *e.g.*, Tex. Code Crim. Proc. Ann., Art. 11.071, § 5 (Vernon's Supp. 1998). In formulating these rules, state courts and legislatures need to know how much latitude for "occasional acts of grace" can be allowed before a state rule will be rendered a virtual nullity and every barred claim will have to be litigated in federal court. The split between the Ninth Circuit and the other circuits leaves that question up in the air.

"A requirement of consistency poses special problems for forfeiture rules, because every state uses exceptions such as 'plain error' or 'sufficient reason' or even 'cause and prejudice' to deal with cases in which application of the ordinary rules would produce unacceptably harsh consequences." *Prihoda, supra*, 910 F. 2d, at 1383.

> "Searching for 'regularity' in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and the inferior courts respect state procedural grounds unless they are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*). A state ground that is solidly established will be respected even though not 'strictly' followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interest of federalism would be served by such a development." *Id.*, at 1384 (emphasis in original).

Prihoda claimed that the fact that he was unrepresented in his first collateral attack was "sufficient reason" to consider a second, *id.*, at 1381, and claimed inconsistency in the Wisconsin courts' acceptance of that reason in some cases and rejection of it in others. *Id.*, at 1384. The Seventh Circuit rejected that argument, noting that other factors, such as the importance of the issue, were also involved. *Ibid.* Case-by-case judgment is required to implement such a rule.

> "The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. *If it were, states would be induced to make their rules draconian rather than to allow prisoners the latitude now available.*" *Id.*, at 1385 (emphasis added).

The opinions of the Ninth Circuit in the present case and in *Morales* stand in stark contrast to the wisdom of *Prihoda*. In the present case, the *Dixon* rule's development over the four decades of its existence allowed for some latitude. See *supra*, at 9. This flexibility, however, proved fatal in the case below as it was used as the basis for the rule's inadequacy. *Fields*, *supra*, 125 F. 3d, at 762-764; see also *supra*, at 9. In *Morales*, instead of recognizing the need for standards such as "good cause" and the benefits to prisoners of having them, the opinion begins by criticizing California's rule for not "set[ting] out criteria for determining 'good cause' to excuse such delay." *Morales* v. *Calderon*, 85 F. 3d 1387, 1391 (CA9 1996). The *Morales* court further explains that "[t]he vagueness of the Standards could have been *cured by narrowing judicial construction* in the years immediately following their issuance. We find no such cases, however." *Ibid.* (emphasis added). This concept is lifted straight from the cases on vagueness of statutes defining crimes or establishing eligibility for capital punishment. See, *e.g.*, *Richmond* v. *Lewis*, 506 U. S. 40, 46-47 (1992); *Kolender* v. *Lawson*, 461 U. S. 352, 355 (1983). The Ninth Circuit apparently believes that a rule granting *leniency*

to a litigant who has defaulted his claim must be drawn with the same precision as a law which *sends* people to the gallows.

The Ninth Circuit does acknowledge the value of discretionary rules, but then implies that only certain kinds of discretion will do. See *Fields*, *supra*, 125 F. 3d, at 762. Unless the state court establishes a body of case law laying out guidelines for the exercise of discretion, the Ninth Circuit will not find the requirement for an "adequate" state ground to have been met. *Ibid.* Because the California Supreme Court, like this Court, typically does not write opinions when it denies original habeas petitions, see *Morales*, *supra*, 85 F. 3d, at 1392, that requirement is not going to be met.

In effect, the Ninth Circuit has created a presumption of irregularity, inverting the usual rule. Cf. *Parke* v. *Raley*, 506 U. S. 20, 29 (1992) ("presumption of regularity" "deeply rooted in our jurisprudence"). Not only must the procedural ground be stated in the individual case, as *Harris* v. *Reed*, 489 U. S. 255, 263 (1989) may require, but the California Supreme Court must now write opinions in *all* of its original habeas petitions so that the Ninth Circuit can "peer majestically over the [state] court's shoulder," *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)), and supervise its application of *state* law.

The Seventh Circuit applies the opposite presumption. The general rule is that state procedural grounds will be respected. To breach this wall, the burden is on the habeas petitioner to show that the state rules "are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*)." *Prihoda*, *supra*, 910 F. 2d, at 1384 (emphasis in original).

This issue has always been important. It is even more important now, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. The conflict among the circuits and the Ninth Circuit's departure from Supreme Court precedent make this an appropriate case for review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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